84

No. 07-849

FILED
FEB 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JULIE E. COLLINS AND ROBERT B. RYAN,

Petitioners,

v.

D.R. HORTON, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

E. KING POOR
Counsel of Record
QUARLES & BRADY LLP
500 West Madison Street
Suite 3700
Chicago, Illinois 60661-2511
(312) 715-5000

LONNIE J. WILLIAMS, JR.
C. CHRISTINE BURNS
QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391
(602) 229-5200

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question that petitioners have presented to this Court—whether a court or arbitrator should decide the preclusive effect of an earlier court judgment—is not an issue the Ninth Circuit ever decided. The reason for this is that petitioners never presented the question there. As shown further in Section I of the Argument, the petition should be denied for this reason alone.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29(6), D.R. Horton, Inc. states that FMR Corporation owns more than 10% of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

ARGUMENT 1

I. The Ninth Circuit Never Reached The Question Presented Here and For Good Reason: Petitioners Never Presented It to the Ninth Circuit 1

A. The Question Presented Before This Court Must Have Been Raised in the Court Whose Decision Is Under Review 1

B. The Question Presented Before This Court Was Never Addressed in the Ninth Circuit 2

1. Though Petitioners Raised the Issue Before the District Court in 2003, They Failed to Raise It Again for the 2005 District Court Decision That the Ninth Circuit Reviewed 2

2. The Petitioners Never Raised the Issue in the Ninth Circuit 5

3. The Ninth Circuit Did Not Address the Issue 8

II. There Is No Recent or Well-Defined Division of Authority Among the Circuits as to Whether a Court or an Arbitrator Must Decide the Issue of Collateral Estoppel 9

TABLE OF CONTENTS—Continued

Page

A. Some Decisions Deal With Res Judicata, Some With Collateral Estoppel, Some With State Law and There Is Hardly a Clear Split of Authority 9

B. Any Alleged Split Among Older Cases Has Been Resolved by This Court's 2002 Decision in *Howsam* 14

III. Petitioner's Theory About Arbitrators' Supposed "Professional Hubris" or Proclivity to Pursue Fees Rather Than Apply the Law, Does Not Raise an Issue of National Importance 16

IV. The Petitioners Cannot Show That the Outcome Would Be Any Different If They Received Relief in this Court..... 18

CONCLUSION 20

APPENDIX

Excerpts from Petitioners' Opening Brief in the Ninth Circuit.....App. 1

Excerpts from Petitioners' Reply Brief in the Ninth Circuit.....App. 10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adickes v. Kress & Co., 398 U.S. 144 (1970).....1

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).....2, 3

Collins v. D.R. Horton, Inc., 252 F. Supp.2d 936 (D. Ariz. 2003).....3

Collins v. D.R. Horton, Inc., 361 F. Supp.2d 1085 (D. Ariz. 2005).....4

Delta Airlines v. August, 450 U.S. 346 (1981).....1

Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002).....14, 15

John Hancock Mutual Life Insurance Co. v. Olick, 151 F.3d 132 (3d Cir. 1993).....10, 15

John Morrell & Co. v. Local Union 304, 913 F.2d 544 (8th Cir. 1990).....12, 14, 17

Kelly v. Merrill Lynch, Pierce, Fenner & Smith, 985 F.2d 1067 (11th Cir. 1993).....14, 15

Klay v. United Healthgroup, Inc., 376 F.3d 1092 (11th Cir. 2004).....14, 15, 17

Miller v. Runyon, 77 F.3d 189 (7th Cir. 1996).....13

Miller Brewing v. Fort Worth Distributing Co., 781 F.2d 494 (5th Cir. 1986).....11, 14

Parklane Hosiery Company, Inc., 439 U.S. 322 (1979).....8, 18, 19

TABLE OF AUTHORITIES—Continued

Page

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 1

Sherrock Bros., Inc. v. DaimlerChrysler, 2008 WL 63300 (3d Cir. Jan. 7, 2008).....11, 14, 18

Steris Corp. v. Int'l Union, 489 F. Supp.2d 501 (W.D. Pa. 2007).....11, 15

Telephone Workers Union v. New Jersey Bell Telegraph Co., 584 F.2d 31 (3d Cir. 1978) 10

United States v. United Foods, Inc., 533 U.S. 405 (2001).....1

United States Fire Ins. Co. v. Nat'l Gypsum Co., 101 F.3d 813 (2d Cir. 1996).....13

Virginia BankShares, Inc. v. Sandberg, 501 U.S. 1083 (1991).....1

In re Y&A Group Sec. Litigation, 38 F.3d 380 (8th Cir. 1994) 12, 14

MISCELLANEOUS

Scott Atlas & Nancy Atlas, *Potential ADR Backlash*, 10 No. 4 Disp. Resol. Mag. (2004) 16

Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 Baylor L.Rev. 753 (2004).....17

Chris Guthrie, *Misjudging*, 7 Nev. L. J. 420 (2007).....16

TABLE OF AUTHORITIES—Continued

Page

Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 Harv. L. J. & Pub. Pol'y 579 (2007).....17

Jarrod Wong, Court or Arbitration—*Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?*, 46 Santa Clara L.Rev. 49 (2005) 12, 13

ARGUMENT

I. The Ninth Circuit Never Reached The Question Presented Here and For Good Reason: Petitioners Never Presented It to the Ninth Circuit.

A. The Question Presented Before This Court Must Have Been Raised in the Court Whose Decision Is Under Review.

A fundamental rule of practice is that this Court does not decide questions that were never raised or decided in the court whose decision is under review. *Adickes v. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (issues neither raised nor addressed by the court of appeals will not ordinarily be considered); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (Court refuses to address issue raised by petitioners, when it was not addressed by the district court or the court of appeals); *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (when the argument was neither raised nor passed upon in the court whose opinion is under review, this Court will not address it.) In particular, a question presented in a petition for certiorari, but not raised in the court of appeals, is not properly before this Court. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). The only exception to this general principle is when the lower court directly raises and addresses an issue *sua sponte*. *Virginia BankShares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). As shown below, the question presented to this Court—whether a court or an arbitrator determines the preclusive

effect of a prior judgment—was never presented to the Ninth Circuit, and the Ninth Circuit never raised the question on its own.

B. The Question Presented Before This Court Was Never Addressed in the Ninth Circuit.

1. Though Petitioners Raised the Issue Before the District Court in 2003, They Failed to Raise It Again for the 2005 District Court Decision That the Ninth Circuit Reviewed.

In February 1999, petitioners filed suit against respondent alleging that it was liable for severance pay and benefits under their employment agreements and for an alleged promise to grant petitioners 30,000 shares of stock. C.R. 1.[1] In December 2000, respondent moved to consolidate this lawsuit with another action brought against it by another former employee, which alleged similar, though not identical claims. *Hickcox v. D.R. Horton, Inc.* (*Hickcox* Case). C.R. 159. Petitioners opposed the motion to consolidate on the grounds that the cases involved different factual and legal issues; the court denied consolidation. C.R. 160, 170.

In March 2001, this Court issued its opinion in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105

---

[1] Citations to the record refer to the clerk's record (C.R.) as set forth in the United States District Court for the District of Arizona, Civil Docket, Case No. 99-CV-330.

(2001), allowing arbitration provisions in employment agreements to be enforced under the Federal Arbitration Act ("FAA") and overruled the existing Ninth Circuit law which held that the FAA did not apply to employment contracts. Following the *Circuit City* decision, respondent moved to dismiss the case and compel arbitration. C.R. 171. The district court granted respondent's motion and dismissed petitioners' action in favor of arbitration. C.R. 219. Shortly after the district court entered its order compelling arbitration, a jury returned a verdict in favor of the plaintiff in the *Hickcox* Case. Pet. at 5-6.

In May 2002, petitioners moved the district court to reconsider its order compelling arbitration based on the fact that a jury verdict had been entered against respondent in the *Hickcox* Case. C.R. 220. Specifically, petitioners argued, among other things, that any relitigation of the claims arising out of the alleged promise of stock were barred by collateral estoppel, and that the issue of collateral estoppel should be decided by a judge rather than an arbitrator. *Id.* This was the first and only time during the eight-year history of this case that petitioners ever raised the issue of whether arbitrators could decide collateral estoppel issues. In March 2003, the district court issued an opinion denying petitioners' motion. *Collins v. D.R. Horton, Inc.*, 252 F. Supp.2d 936 (D. Ariz. 2003). C.R. 228. After an extensive discussion of the case law, the court held that the question of collateral estoppel could be decided by arbitrators. *Id.* at 944-45.

Petitioners then submitted their claims to arbitration and asked the arbitrators to apply collateral estoppel to the claims arising out of the *Hickcox* Case judgment. E.R. 229, Ex. F.[2] The arbitrators refused to apply collateral estoppel because the *Hickcox* Case judgment was on appeal. The arbitrators issued an award finding in favor of petitioners on the breach of contract claims and against petitioners on the fraud claims related to respondent's alleged promise to issue stock. E.R. 229, Ex. H.

Petitioners moved the district court to confirm in part and vacate in part the arbitrators' decision and enter judgment as a matter of law based on collateral estoppel. C.R. 229. With respect to the alleged promise of stock, petitioners argued solely that the arbitrators acted in "manifest disregard of the law" by failing to apply collateral estoppel and they requested that the district court enter judgment in their favor on those claims and award compensatory and punitive damages. Pet. App. at 41a, 51a.[3] Yet petitioners did not mention, much less argue, the issue of whether the court or arbitrator should determine the preclusive effect of a prior judgment. *Id.*

---

[2] Documents filed in the Arbitration Proceedings are not identified as part of the District Court's Record. Therefore, citations to "E.R." refer to Petitioners' Excerpts of Record filed with their Ninth Circuit Brief.

[3] Reported at *Collins v. D.R. Horton, Inc.*, 361 F. Supp.2d 1085 (D. Ariz. 2005).

The district court confirmed the arbitration award in all respects. *Id.* at 56a. With the exception of merely mentioning the fact that petitioners raised the issue in their 2003 motion for reconsideration, the district court did not discuss whether a court or an arbitrator should decide the issue of collateral estoppel. *Id.* at 26a. Rather, the court focused on petitioners' argument that the arbitrators improperly failed to apply collateral estoppel, and in doing so they "manifestly disregarded" the law. *Id.* at 55a.

2. The Petitioners Never Raised the Issue in the Ninth Circuit.

The simplest way to test whether an issue was raised in the court of appeals is to look at the "issue presented" section of the opening brief. In this case, petitioners failed to raise the question of whether an arbitrator can decide collateral estoppel in that section of their opening brief. Instead, they described the issue as follows:

> Julie Collins, Robert Ryan, and Tom Hickcox were part of a management team that received, as a group, the same fraudulent promise from DRH, and they filed lawsuits alleging identical contract and fraud claims. DRH litigated and lost the first action brought by Hickcox. Collins' and Ryan's claims were then tried to arbitrators, who refused to apply collateral estoppel because DRH had appealed Hickcox's judgment. The district court found that the arbitrators had

> committed legal error in allowing DRH to relitigate the issues but held that they did not show "manifest disregard of the law" because they did not subjectively understand their error. Did the court err by failing to vacate the arbitration award?

Resp. App. at 2-3.[4] Petitioners do not quote or refer to the issue they presented to the Ninth Circuit in their petition. Rather, they piece together citations to other portions of their briefs to argue that the issue of whether an arbitrator can decide collateral estoppel issues was raised elsewhere. Pet. at 11, n.4.

Yet examining these page citations readily shows that the issue presented to this Court was never raised in the Ninth Circuit. Petitioners cite to four pages in their opening brief (pages 12-13 and 29-30) and one page in their reply brief (page 29) as supposed proof that they raised the issue below. Pet. at 11, n.4. Such citations cannot, however, be read to stand for the proposition that the issue was raised before the Ninth Circuit.

In particular, at pages 12-13 of their opening brief, petitioners argue only that the pendency of an appeal in the *Hickcox* Case did not excuse the arbitrators from applying collateral estoppel (Resp. App.

---

[4] The pages which petitioners cite to argue that they raised the issue in the Ninth Circuit (*see* Petition at 11, n.4) as well as the Issue Presented from the opening brief in the Ninth Circuit are included in the appendix to this brief (Resp. App.).

at 3-5) and at pages 29-30 they argue against the district court's interpretation of the "manifest disregard" standard for reviewing arbitration awards. Resp. App. at 6-9. Similarly, at page 23 of their reply brief petitioners merely conclude their argument that the district court erred under the manifest disregard standard. Resp. App. at 11. Yet there is no argument in any of the cited pages, or anywhere else, that raises the issue of whether a court or an arbitrator should decide collateral estoppel issues.

As further evidence that the issue was not presented to the Ninth Circuit, the relief that petitioners request here is inconsistent with what they requested in the Ninth Circuit. There, petitioners requested that the court reverse the district court judgment and enter a judgment of damages in favor of petitioners in the same amount as the *Hickcox* Case. Appellants' Opening Br. at 24, 30. In contrast, as shown in Section IV below, a reversal by this Court could not result in an award of damages, but rather only a remand to have the district court weigh the factors as to whether collateral estoppel should apply to the facts of this case.

Finally, petitioners make a vague reference to the issue being raised at oral argument, but do not provide specific quotes, let alone the context. Pet. at 11, n.4. That is because the issue was not addressed at oral argument. Merely citing generally to the Ninth Circuit's audio file for oral argument is not evidence of anything. And it certainly does not support the argument that petitioners raised the issue there.

3. The Ninth Circuit Did Not Address the Issue.

Not only did petitioners themselves fail to raise the issue below, the Ninth Circuit never raised it *sua sponte*. Petitioners cite to one phrase contained in the Ninth Circuit's opinion in an attempt to argue the Ninth Circuit addressed the issue. Pet. at 12, Pet. App. at 17a. Petitioners state that the Ninth Circuit held that "arbitrators are entitled to determine in the first instance whether the prerequisites for collateral estoppel are satisfied" and imply that the Court issued this holding after first considering the issue of whether the court or the arbitrator should determine if collateral estoppel applies. Pet. at 12. However, petitioners take this phrase completely out of context.

In discussing the issue of whether arbitrators are bound by federal court decisions, the Ninth Circuit did in fact conclude that, based on this Court's opinion in *Parklane Hosiery Company, Inc.*, 439 U.S. 322, 332 (1979), "arbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of *res judicata* and collateral estoppel, although they generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect." Pet. App. at 11a. Yet the Ninth Circuit never addressed whether the court or arbitrator should conduct the collateral estoppel analysis; rather it concluded that when conducting the analysis, an arbitrator must give preclusive effect to prior federal judgments where the prerequisites for collateral estoppel are satisfied. *Id.* at 16a-17a.

In sum, whether an issue was raised below should not require a search of the briefs, oral argument audio files and the opinion to determine if the issue could, under some reading, somehow be discerned. Here, if petitioners had actually raised the issue below, it would have been set forth directly on the first page of their opening brief and it would have been apparent from the overall argument in the briefs and from the opinion itself. Further, one oblique, passing reference to the issue that petitioners take out of context is obviously insufficient for the issue to be considered as having been raised *sua sponte*. As such, the Ninth Circuit never considered, weighed or ruled on the issue of whether an arbitrator or a court has the authority to decide the issue of collateral estoppel. The petition should be denied for this reason alone.

II. There Is No Recent or Well-Defined Division of Authority Among the Circuits as to Whether a Court or an Arbitrator Must Decide the Issue of Collateral Estoppel.

A. Some Decisions Deal With *Res Judicata*, Some With Collateral Estoppel, Some With State Law and There Is Hardly a Clear Split of Authority.

As shown in the last section, the petition should be denied for the threshold reason that the question presented was never raised or decided in the Ninth Circuit. Yet even if the merits of the petition could be considered, petitioners have not presented any

convincing reason to grant it. First, petitioners claim a division of authority between the Second, Eleventh and the Ninth Circuits that hold arbitrators may decide preclusion issues, and the Third, Fifth, and Eighth Circuits that supposedly hold that only courts may do so. Pet. at 13-14. Petitioners also cite a number of state court decisions addressing the issue (Pet. at 15), yet these may be safely ignored since this Court does not reconcile divergent opinions among state courts. Moreover, a review of the federal cases cited by petitioners shows no real division among the circuits.

First, the law of the Third, Fifth, and Eighth Circuits is far from holding that an arbitrator can never decide the issue of collateral estoppel. As to the Third Circuit precedent petitioners cite, the first case, *Telephone Workers Union v. New Jersey Bell Tel. Co.*, 584 F.2d 31 (3d Cir. 1978), is a 30-year old case involving an action to enforce an arbitration award after-the-fact, as opposed to compel arbitration. There, the court mentioned without analysis that when a court is presented with a question of whether an earlier judgment barred relitigation, the court would decide that issue. *Id.* at 32. The second case, *John Hancock Mutual Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1993), dealt with *res judicata* which involves preclusion of an entire claim as opposed to the more limited effect of collateral estoppel which bars only individual issues. As shown below, the authority cited by petitioners notes a difference

between the two when it comes to arbitrators deciding preclusion issues.

Moreover, beyond these 15 and 30-year old cases, more recent authority from the Third Circuit has dispelled any notion that it would not allow arbitrators to decide preclusion issues. Most recently, in *Sherrock Bros., Inc. v. DaimlerChrysler*, 2008 WL 63300 (3d Cir. Jan. 7, 2008), the court held that arbitrators had correctly applied *res judicata* and collateral estoppel to determine that an earlier federal court judgment barred further litigation. *Id.* at *3. And even before *Sherrock*, the court in *Steris Corp. v. Int'l Union*, 489 F. Supp.2d 501, 512 (W.D. Pa. 2007) readily found that Third Circuit law allowed arbitrators to rule on such issues: "We conclude that the law of this Circuit [the Third] makes the preclusive effect of a prior arbitration an issue for an arbitrator to decide." Plainly, the Third Circuit cannot be counted to show any supposed split in authority.

This leaves the Fifth and Eighth Circuits. As to the Fifth Circuit, petitioners cite only one 22-year old decision, *Miller Brewing v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986). But *Miller Brewing* does not deal with federal law. Rather, there the court considered the *res judicata* effect of a state court judgment and the Fifth Circuit applied Texas law as to that. *Id.* at 498-99. As such, *Miller Brewing* has little precedential value when considering a division among the circuits on federal law.

Of the two Eighth Circuit cases cited by petitioners, neither squarely holds that an arbitrator can never decide preclusion issues. In *In re Y&A Group Sec. Litigation*, 38 F.3d 380 (8th Cir. 1994), the court stated that courts had the "power to defend their judgments as *res judicata*," but this statement was made in the limited context of a consent decree with an express injunction barring relitigation. *Id.* at 382. At the same time, one member of the panel, Judge Arnold, pointed out in a concurring opinion that the decision turned on this express reservation to bar future litigation, and therefore, "I do not read this Court's opinion today to hold generally that courts may, by injunction, control the decision of arbitrators on questions of issue or claim preclusion." *Id.* at 384.

The other Eighth Circuit case, *John Morrell & Co. v. Local Union 304*, 913 F.2d 544 (8th Cir. 1990), actually supports the opposite view. There, the court stated, "[w]e recognize that the arbitrator had the authority to determine *in the first instance* whether to give the prior judicial determination preclusive effect," and then reviewed the arbitrator's decision *after* it had made that determination. *Id.* at 562 (emphasis added). Thus, the law of the Eighth Circuit cannot be said to bar arbitrators from deciding preclusion issues.

Petitioners also overlook the difference between an arbitrator deciding issues of *res judicata* which involves an entire claim, and collateral estoppel, which involves only individual issues. Indeed, the law review article that petitioners cite (Pet. at 16), Jarrod

Wong, *Court or Arbitration—Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?*, 46 Santa Clara L. Rev. 49, 58-59 (2005)—despite its title—does *not* maintain that there is a split of authority at all; it actually argues that any supposed division can be "reconciled." *Id.* at 51. In particular, the author draws a distinction between a court giving *res judicata* effect to its *own* order versus an arbitrator deciding the preclusive effect of another court's judgment and argues that courts generally approve of both approaches. *Id.* at 51-52. The article makes a further distinction between an arbitrator deciding collateral estoppel issues and concludes that a court's need to protect its own judgment is "more limited in the context of collateral estoppel because it affects only issues and not entire claims," and therefore, "arbitrators rather than courts should determine the collateral estoppel effects of a prior decision." *Id.* at 91. *See also, Miller v. Runyon*, 77 F.3d 189, 193-94 (7th Cir. 1996) (court states *in dicta* that when deciding whether an arbitrator may decide preclusion issues, "a distinction must be made between *res judicata* and collateral estoppel"). Petitioners make no attempt to address the distinction between *res judicata* and collateral estoppel and cannot point to any real disagreement among the circuits as to whether arbitrators can decide collateral estoppel issues. *See, e.g., United States Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813, 817 (2d Cir. 1996) (question of collateral estoppel within the contemplation of the issues parties agreed to arbitrate).

Thus, there is no recent or well-defined division among the circuits as to whether arbitrators may consider the question of collateral estoppel. Especially in light of *Sherrock*, the Third Circuit does not bar arbitrators from deciding that question. The only Fifth Circuit case cited, *Miller Brewing,* is over 20 years old and deals with state law. And the Eighth Circuit cases either say just the opposite (*John Morrell*) or are limited to its own facts (*Y&A Group*). As such, there is no division of authority.

B. Any Alleged Split Among Older Cases Has Been Resolved by This Court's 2002 Decision in *Howsam*.

Not only have petitioners failed to demonstrate any division of authority among the circuits, they also have not addressed this Court's more recent decision in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) which courts have relied on to hold that arbitrators can decide preclusion issues. In *Howsam*, this Court held that while the question of "substantive arbitrability" is for a court, "procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrator to decide." *Id.* at 85.

For example, in *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004), the court held that its earlier decision, *Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir. 1993) holding

that courts, rather than arbitrators should decide preclusion issues, could no longer stand in light of *Howsam*.[5] In *Klay*, the court considered whether arbitrators could decide the preclusive effect of an earlier court ruling and held that based on *Howsam*, "arbitrators . . . are empowered, absent an agreement to the contrary, to resolve disputes over whether a particular claim may be successfully litigated anywhere at all (due to concerns such as statute of limitations, laches, justiciability, etc.), or has any substantive merits whatsoever. . . . Consequently, . . . *res judicata* was for the arbitrator to decide in the first instance." *Id.* at 1109. Again, in *Steris Corp.*, 489 F. Supp.2d at 511, the court relied on *Howsam* to conclude that the preclusive effect of a court judgment was a "procedural question" for the arbitrator to decide. On the other hand, petitioners do not cite any division between federal courts of appeals as to whether preclusion issues are, under *Howsam*, reserved for arbitrators. As such, this only reinforces that there is no split among the circuits.

---

[5] The *John Hancock Mutual Life* case cited by petitioners (Pet. at 14) relied on *Kelly* as evidence of a division of authority. 151 F.3d at 137.

III. Petitioner's Theory About Arbitrators' Supposed "Professional Hubris" or Proclivity to Pursue Fees Rather Than Apply the Law, Does Not Raise an Issue of National Importance.

Petitioners also argue that this case presents an "issue with national implications." Pet. at 18. As petitioners frame it, the issue highlights the "broader struggle between judicial and arbitral systems." *Id.* at 21. In essence, petitioners maintain that arbitrators cannot be trusted to decide questions of claim or issue preclusion. According to the petitioners, that lack of trustworthiness manifests itself in two ways. First, petitioners contend that arbitrators suffer from what they call "professional hubris" because arbitrators think that they are "simply smarter, better educated or endowed with greater industry expertise than jurors" or are "less constrained by resource or time limitations and procedural niceties than judges." Pet. at 21. Petitioners cite no authority for this sweeping proposition other than a passing comment from a magazine article (Scott Atlas & Nancy Atlas, *Potential ADR Backlash*, 10 No. 4 Disp. Resol. Mag. 14, 15-16 (2004)) and *dicta* from a 24-year old district court opinion dealing with whether arbitrators can decide the preclusive effect of a labor board decision.[6] Thus,

---

[6] The other authority cited by petitioners does not come close to making the point that arbitrators have too much "professional hubris" to properly decide the preclusive effect of a judgment. Pet. at 21-22; Chris Guthrie, *Misjudging*, 7 Nev. L. J. 420, 454-55 (2007) (article observes the ways that arbitration

(Continued on following page)

there is simply no support for the categorical statement that arbitrators as a whole are too prideful to decide the preclusive effect of judgments.

Next, petitioners argue that arbitrators are so driven by self-interest that they will disregard the law of *res judicata* or collateral estoppel, so they can protract proceedings and collect more fees. Pet. at 22-23. Again, petitioners offer meager support for this wholesale dismissal of arbitrators' abilities. Petitioners merely quote a comment from a law review that is itself tentative—the quote does not include the introductory phrase "It has been said . . . " Pet. at 22; Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 Harv. L. J. & Pub. Pol'y 579, 587 (2007). And petitioners' citation to another law review (Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 Baylor L. Rev. 753, 787-88 (2004)) states just the opposite; namely, that there is "no documented support" that "arbitrators will put their own interests ahead of their responsibility."

What is more, courts have demonstrated that they are comfortable with having arbitrators decide such issues and there is no widespread judicial reluctance to having them do so. *See, e.g. Klay*, 376 F.3d at

---

may be a more "accurate" and appealing forum); *John Morrell*, 913 F.2d at 562 (court's reference to overturning arbitrator's award if it reflects his "own brand of industrial justice" is merely a statement of the standard of review and says nothing about arbitrators being too prone to "hubris" to follow the law.).

1109 ("*res judicata* was for the arbitrator to decide in the first instance"). For example, contrary to petitioners' claim that arbitrators are too self-possessed or self-interested to decide preclusion issues, in *Sherrock*, 2008 WL 63300 at *3, the Third Circuit concluded that the arbitrators correctly applied *res judicata* and collateral estoppel to bar relitigation of the matters already decided in court. At bottom, petitioner's argument about a "broader struggle" is little more than another version of the perennial debate about the "pros and cons" of arbitration versus litigation. It scarcely presents an issue of national importance.

IV. The Petitioners Cannot Show That The Outcome Would Be Any Different if They Received Relief in This Court.

As shown in Section I above, petitioners presented a different issue to the Ninth Circuit than they now present to this Court. Yet even assuming this Court were to reach the question now presented, they cannot show that the outcome would be any different if this Court were to hold that the issue of collateral estoppel must be decided by a court and not an arbitrator. This is so because, as this Court made plain in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979), the application of offensive nonmutual collateral estoppel, as petitioners seek here, is not automatic and it always requires a weighing of a variety of factors. *Id.* at 331. No court in this case,

however, has ever weighed these factors and petitioners have not requested this Court do so here.

While petitioners do not expressly state the relief they are requesting before this Court, apparently they seek a reversal so as to send the issue of collateral estoppel back to the district court. Petitioners requested different relief from the Ninth Circuit. There, petitioners requested that the court reverse the district court's order, enter judgment in favor of petitioners, and award petitioners compensatory and punitive damages. *See* Section I.B. at 7. The Ninth Circuit rejected petitioners' request and did not conduct a fact-specific analysis as required under *Parklane Hosiery* as to whether collateral estoppel should be applied.

Like the Ninth Circuit, the district court never conducted an analysis of whether collateral estoppel applies to this case. In fact, in its 2005 Order that is the basis of this appeal, the court specifically stated: "The Court expresses no opinion on whether collateral estoppel in fact bars relitigation of issues related to the alleged 30,000 share promise. . . . The issue before the Court at this stage is not whether Plaintiffs established all of the elements of collateral estoppel . . . , but rather whether the arbitrators manifestly disregarded the law by refusing to even consider Plaintiffs' collateral estoppel argument because the *Hickcox* judgment was on appeal." Pet. App. at 45a.

Thus, if this case were remanded, the district court would be required to analyze whether collateral estoppel applies under *Parklane Hosiery*. Therefore,

the district court could reach the same result as the arbitrators on the issue of collateral estoppel and the outcome of the case would be the same. While it is not uncommon for this Court to remand cases where the outcome is uncertain, in this case, it bears mentioning that a remand only would result in additional litigation that would not necessarily change the outcome of the case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

D.R. Horton, Inc.

E. KING POOR
Counsel of Record
QUARLES & BRADY LLP
500 West Madison Street
Suite 3700
Chicago, Illinois 60611-2511
(312) 715-5000

LONNIE J. WILLIAMS, JR.
C. CHRISTINE BURNS
QUARLES & BRADY LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004-2391
(602) 229-5200

Attorneys for Respondent

Dated: February 27, 2008

App. 1

No. 05-15737

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIE E. COLLINS, ROBERT B. RYAN, INDIVIDUALS,

Plaintiffs-Appellants,

vs.

D.R. HORTON, INC., A DELAWARE CORPORATION,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Arizona
Hon. Roslyn O. Silver, Presiding

OPENING BRIEF OF APPELLANTS

STEPTOE & JOHNSON UP
LAWRENCE ALLEN KATZ
BENNETT EVAN COOPER
ELIZABETH A. SCHALLOP CALL
Collier Center
201 East Washington Street, Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200
Attorneys for Appellants Julie E. Collins
and Robert B. Ryan

* * *

App. 2

[Page 1]

STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the United States District Court for the District of Arizona confirming the arbitration award in the contract and fraud action by plaintiffs-appellants Julie E. Collins and Robert B. Ryan against defendant-appellee D.R. Horton, Inc. ("DRH"). (ER.243, 244.)[1] The district court entered its judgment on March 21, 2005. (ER.244.) Collins and Ryan timely filed their notice of appeal on April 19, 2005. (ER.246.)

The district court had jurisdiction of this action under 28 U.S.C. § 1332 (2002). This Court has jurisdiction of this appeal under 28 U.S.C. § 1291 (2002).

STATEMENT OF THE ISSUE PRESENTED

Julie Collins, Robert Ryan, and Tom Hickcox were part of a management team that received, as a group, the same fraudulent promise from DRH, and they filed lawsuits alleging identical contract and fraud claims. DRH litigated and lost the first action brought by Hickcox. Collins' and Ryan's claims were then tried to arbitrators, who refused to apply collateral estoppel because DRH had appealed Hickcox's

---

[1] "CR" refers to the docket number in the district court clerk's record. "ER" refers to the tab number in Appellants' Excerpts of Record. The ER numbers are the same as the CR numbers.

judgment. The district court found that the arbitrators had committed legal error in allowing DRH to relitigate the issues but held that they did not show "manifest disregard of the law" because they did not subjectively understand their error. Did the court err by failing to vacate the arbitration award?

STATEMENT OF THE CASE

A. Nature of the Appeal

This appeal arises from two parallel lawsuits for breach of contract and fraud brought in the district court by three former employees of D.R. Horton, Inc. ("DRH"), Julie Collins, Robert Ryan, and Tom Hickcox. All three had been

* * *

[Page 12]

Second, the preclusive effect of the judgment in *Hickcox* was not changed by DRH's appeal. As this Court has recognized, the pendency of an appeal should "in no way affect the 'firmness' of the . . . district court [decision] for purposes of issue preclusion." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988); *see also Hawkins v. Risley*, 984 F.2d 321, 325 (9th Cir. 1993) (following *Robi*). Leading commentators confirm that "in federal courts . . . the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and*

Procedure § 4433, at 71 (2d ed. 2002) ("Wright & Miller"). Indeed, that rule has been settled for over a century. *Id.* at 78-79. While "[f]ederal [sic] law governs the collateral estoppel effect of a case decided by a federal court," *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996), the law of Arizona, the locus of the dispute, similarly disregards the pendency of an appeal in applying preclusion doctrines. *See Ariz. Downs v. Superior Court*, 623 P.2d 1229, 1232 (Ariz. 1981) (adopting majority rule).

In light of the clear governing law, the arbitrators were not entitled to disregard the preclusive effect of the *Hickcox* judgment just because they were concerned about the possibility that the judgment might be upset on appeal. It is not unusual for there to be two actions in which "the second judgment has become conclusive even though it rested solely on a judgment that was later reversed." 18A Wright & Miller, *supra*, at 88-89 (collecting cases). In those cases, the rule recognized by this Court in *Robi* still applies because, "[d]espite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse," i.e., "the burdens of retrial, the potential for inconsistent results, and the occasionally bizarre problems of achieving repose and finality that may arise." *Id.* at 94.

[Page 13]

Moreover, to the extent that the binding nature of the arbitration was an issue, DRH brought this situation on itself not only by agreeing to binding arbitration but also by moving, successfully, over Collins and Ryan's objections, to compel arbitration of their claims on the eve of trial, after two years of litigating in the district court. (*See* CR.171, 172.) Indeed, the *Hickcox* jury returned its verdict and Judge Bolton entered judgment on it shortly after Judge Silver ordered arbitration on DRH's motion. The verdict and judgment put DRH on notice of the preclusive effect that judgment would have on Collins' and Ryan's claims. In light of these circumstances and Collins and Ryan's subsequent motion for reconsideration, DRH could have waived arbitration and litigated the issues in district court, thereby recovering the option of appeal. The arbitrators' invocation of "practicality and fairness" furthered only impracticality and unfairness.

The arbitrators improperly arrogated to themselves the right to restrike the balance between preclusion and finality. No doubt a few state courts, possibly out of a similar concern for reversal on appeal, require that the appellate process be concluded before a judgment will be given preclusive effect in another proceeding. *See, e.g., Swaffield v. Universal Ecsco Corp.*, 76 Cal. Rptr. 680, 687 (Ct. App. 1969) ("the California rule is that a judgment is not final for purposes of collateral estoppel until final disposition on appeal"). The federal courts, however,

have determined that pendency of the appeal should be disregarded unless and until the judgment is actually vacated – indeed, they have done so uniformly. *See generally* 18A Wright & Miller, *supra*, § 4433, at 71. The federal courts' determination was binding on the arbitrators and, more importantly, on Judge Silver.

Indeed, the very chronology of this case suggests a textbook example of the mischief that may result from allowing preclusion to be undone by the mere pendency of an appeal and "the bizarre problems of achieving repose and finality that may arise." 18A Wright & Miller, *supra*, at 94. Upon its entry, the *Hickcox*

* * *

[Page 29]

framework" for the "manifest disregard" standard. Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. Disp. Resol. 117, 134, *cited in* 361 F. Supp. 2d at 1100. Quoting the article, the district court declared that "an error of law, 'no matter how obvious or outrageous a court may deem it to be, cannot alone justify vacatur,'" because the court must also make a "'two-dimensional, mens rea'-like, state of mind determination.'" 361 F. Supp. 2d at 1100 (quoting Hayford, *supra*, at 124). The author of the article admitted, however, that his proposal established a "very narrow scope" for the standard and that "[n]one of the current models for

the 'manifest disregard' of the law analysis orders the judicial inquiry in the manner described above." Hayford, *supra*, at 136. Given the numerous circuit decisions discussing the "manifest disregard" standard and its application, it is remarkable that the district court would choose to rely on an obscure legal commentary for an admittedly "very narrow" and unprecedented interpretation of the standard.

Moreover, the district court's adoption of a subjective "mens rea" requirement is completely unworkable. Proving the "state of mind" of the arbitrators – whether they "'have consciously or intentionally chosen not to apply [the law] to the facts of the case'" – would require parties to depose arbitrators after they have rendered their decisions. *Collins*, 361 F. Supp. 2d at 1100 (quoting Hayford, *supra*, at 124). Without such discovery as a check, arbitrators would quickly learn that, unless they were to declare openly their nullification of the law, they could escape any meaningful judicial scrutiny by simply omitting or obscurely stating their reasoning, regardless of how "obvious or outrageous" their departure from the law might be. The result would be rulings so cryptic that parties would lose all faith in the arbitration process, which would undercut the federal policy in favor of arbitration.

[Page 30]

In fact, the established precedent in this Court and elsewhere does not impose any "mens rea" standard in demonstrating manifest disregard. Indeed, in

requiring that the "disregard" be "manifest," the courts have avoided such purely subjective determinations of the arbitrator's actual state of mind. The 1961 *San Martine* case cited by the district court was one of this Court's earliest articulations of a non-statutory ground for vacatur of an arbitration award. The Court merely stated that "manifest disregard of the law must be something beyond and different from mere error in the law or failure on the part of the arbitrators to understand or apply the law." 293 F.2d at 801. The Court gave a single but non-exclusive example: "We apprehend that a manifest disregard of the law . . . might be present when arbitrators understand and correctly state the law, but proceed to disregard the same." *Id.*

Since then, however, the Court has provided further guidance as to circumstances under which an arbitration award may be deemed to be in manifest disregard of the law. In *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982), for example, the Court affirmed the district court's vacatur of an arbitration award in favor of a government employee where the *undisputed facts compelled the conclusion* – contrary to that reached by the arbitrator – that the employee had participated in a strike and therefore should not be reinstated under federal law. *Id.* at 1284-85. The Court later cited its *American Postal* decision as "recogniz[ing] that an arbitration decision in manifest disregard of law *and fact* will not be upheld." *Pac.*

Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1025 (9th Cir. 1991) (emphasis added).

Even more recently, in *Coutee v. Barrington Capital Group*, 336 F.3d 1128 (9th Cir. 2003), the Court recognized that "*American Postal* stands for the unexceptional proposition that a federal court will not confirm an arbitration award that is *legally irreconcilable with the undisputed facts*." *Id.* at 1133. As the Court

* * *

App. 10

No. 05-15737

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIE E. COLLINS, ROBERT B. RYAN, INDIVIDUALS,

Plaintiffs-Appellants,

vs.

D.R. HORTON, INC., A DELAWARE CORPORATION,

Defendant-Appellee.

On Appeal from the United States
District Court for the District of Arizona
Hon. Roslyn O. Silver, Presiding

APPELLANTS' REPLY BRIEF

STEPTOE & JOHNSON UP
LAWRENCE ALLEN KATZ
BENNETT EVAN COOPER
ELIZABETH A. SCHALLOP CALL
Collier Center
201 East Washington Street, Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200
Attorneys for Appellants Julie E. Collins and Robert B. Ryan

* * *

that burden would be carried by a finding that the policy was "explicit, well-defined, and dominant."

Furthermore, in *Coutee v. Barington Capital Group*, 336 F.3d 1128, 1133 (9th Cir. 2003), the Court held that "an arbitrator's failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard for the law." Again, no specific proof of the arbitrator's personal understanding and correct statement of such facts was required, because that finding would be implicit in the existence of "undisputed, legally dispositive facts." *Coutee* and the *Carpenters* cases are thus harmonious with *San Martine* and do not require direct proof of the mens rea that the district court deemed essential to finding manifest disregard.

Collins and Ryan are entitled to an order vacating the arbitration award under the criteria recognized by this Court. The Supreme Court's *Arizona* and *Montana* decisions establish that "a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive," 460 U.S. at 619, and this Court's Clements decision establishes that collateral estoppel reflects an important "public interest" because it helps maintain "confidence in the judicial process," 69 F.3d at 330. It is thus beyond dispute that collateral estoppel is an "explicit, well-defined and dominant policy," and when arbitrators refuse to apply that doctrine, the

courts' usual willingness to tolerate errors in an arbitral forum must give way to a greater interest.

CONCLUSION

The Court should remand this matter to the district court with instructions to enter judgment in favor of Collins and Ryan for compensatory and punitive damages consistent with those awarded in *Hickcox*.

DATED this 15th day of December, 2005.

* * *